MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR UNITED STATES STEEL CORPORATION AS AMICUS CURIAE

United States Steel Corporation respectfully moves for leave to file a brief *amicus curiae*. Appellants have consented to the filing of such a brief. Appellee has not.

United States Steel Corporation had no knowledge of the existence of this litigation until the three-Judge panel's decision was reported in various newspapers. On April 28, 1976, it filed a motion to intervene in the United States District Court which was denied on May 26, 1976 on the grounds that United States Steel Corporation had adequate notification about the case from the newspapers and on the grounds that the district court lacked jurisdiction to entertain the motion since an appeal had been taken. Therefore, a brief *amicus curiae* is the only way United States Steel Corporation now can be heard.

The order of the three-Judge panel in this case requires the Ohio Bureau of Employment Services to pay unemployment compensation benefits to plaintiff Hodory, an employee of United States Steel Corporation, and several hundred other of its employees as the members of a class.

United States Steel Corporation is a registered employer with about 17,000 employees located in Ohio. It is subject and is in full compliance with the Ohio Unemployment Compensation Act.

Under the provisions of the Ohio Unemployment Compensation Act which establishes a merit rating system for the payment of contributions by Ohio employers, United States Steel Corporation in effect will pay the benefits ordered to be paid—approximately $316,000. See Section 4141.25 of the Revised Code of Ohio.

Further, under Ohio law, United States Steel Corporation is an interested party. It is entitled to notice of proceedings before the state unemployment compensation agency which involve its employees and the potential charges against it for payment of benefits to such employees. It has certain appeal rights which it exercised on the claims at issue here which were allowed by the Ohio agency. See Sections 4141.01(I) and 4141.28 of the Revised Code of Ohio. These appeals are still pending before the Ohio Board of Review awaiting the final order in this case before being processed further. Also, there are other claims by employees of United States Steel Corporation which were denied by the Ohio agency and which also would be affected by the order of the three-Judge panel in the event it becomes final.

The proprietary interest of United States Steel Corporation in the Ohio unemployment compensation fund is substantial and it should be heard in this case. See *Carnegie-Illinois Steel Corporation v. Review Board,* 117 Ind. App. 379, 72 N.E. 2d 662 (1947). Carnegie-Illinois Steel Corporation is now a part of United States Steel Corporation.

The interests of United States Steel Corporation are not adequately represented by the appellants. The interests of the appellants are to see that the laws of the State of Ohio are enforced. They have no particular interest in whether or not the employees of United States Steel Corporation receive benefits. *Trbovich v. United Mine Workers,* 404 N.S. 528, 538-9(1972), has established the principle that a governmental agency cannot adequately represent the interest of a private party. It is only by coincidence that the appellants are to be considered generally on the same side of the issues herein as United States Steel Corporation.

The lack of notice to United States Steel Corporation of the pendency of the proceedings before the three-Judge panel raises a question of due process under the Fifth Amendment. The decision of the three-Judge panel on the constitutionality of this labor dispute disqualification was improper and should be reversed.

Accordingly, we repectfully request that the Court grant United States Steel Corporation's motion for leave to file the brief *amicus curiae* which is attached hereto.

.....

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BRIEF FOR UNITED STATES STEEL CORPORATION AS AMICUS CURIAE

The Memorandum Opinion of the three-Judge panel below is based on the following conclusions:

1. The financial interest of an Ohio employer in the state's unemployment compensation fund is not significant in a labor dispute unless the employer has reached a financial crisis.

The lower court stated on page 11 of its Opinion that

"Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a *financial crisis*, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to *prevent bankruptcy*." [Underscoring supplied]

2. The state unemployment compensation laws may deny benefits to claimants otherwise eligible and qualified only if they are voluntarily unemployed. See pp. 8 and 9 of the Opinion. If they are involuntarily unemployed, otherwise eligible and qualified, denial of

benefits is discriminatory, a denial of equal protection, and "violates plaintiff's right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. ¶1983." See pp. 8, 9, 10 and 11 of the Opinion.

Recognition of the erroneous reasoning in either one of the above will be fatal to the order of the three-Judge panel below.

If the financial interest of United States Steel Corporation is significant, then the decision below violates the Fifth Amendment because United States Steel Corporation was not made a party. If it is valid for a state to deny benefits to claimants in a labor dispute situation for weeks in which they are involuntarily unemployed, then there is no discrimination nor denial of due process.

1. The Financial Interest of United States Steel Corporation Is Significant and Substantial. Failure to Recognize It Violates the Fifth Amendment.

The appellee, Hodory, was an employee of United States Steel Corporation at the time of his separation from work on November 12, 1974. He was one of 1,402 employees who were laid off by United States Steel Corporation because of a strike in coal mines owned by United States Steel Corporation in a state other than Ohio. The average weekly benefit amount of such employees is $100. The duration of their unemployment was for a total of 3163 weeks. Using these figures, the potential charges to the Ohio unemployment compensation account of United States Steel Corporation will be approximately $316,000.00.

Under the merit rating system in effect in Ohio, each employer is expected to pay the benefits paid to its employees. Since the time Ohio benefits began to be paid in 1939, United States Steel Corporation has paid into the Ohio unemployment compensation fund sufficient amounts to pay the claims of its employees from 1939 to the present time. It is reasonable to assume that it will be in existence and contributing to the Ohio fund in the next three to four years of the foreseeable future, so that all dollars paid to the claimants herein in effect will be represented by dollars contributed to the fund by United States Steel Corporation as a result of increased rates. See Section 4141.25 of the Revised Code of Ohio. Whether United States Steel Corporation is or is not in a financial crisis is immaterial. The question more properly to be asked is "What is the interest of United States Steel Corporation?"

The interest of the employer in the unemployment compensation fund is recognized by Ohio law. The employer of a claimant is made an interested party by statute. It is given notice of the proceedings on a claim as the claim is processed by the agency, and it is given appeal rights. It is a necessary party to any proceedings in court which involve the claim. See Section 4141.01(I), 4141.28 and 4141.24 of the Revised Code of Ohio.

In *Carnegie-Illinois Steel Corporation v. Review Board,* 117 Ind. App. 379, 72 N.E. 2d 662 (1947), the Court, commenting on the same interest in a similar law, said, "Appellees contend that there can be no constitutional question involved for the reason that the appellant has no proprietary interest . . .", and in reply the Court said, ". . . an employer contributes to the fund and has such an interest in its disbursement, and as the appellees admit, may be financially affected thereby in the form of lower rates. This is clearly a sufficient proprietary interest to maintain this appeal." Carnegie-Illinois Steel Corporation is now a part of United States Steel Corporation.

It is clear, therefore, that the interest of United States Steel Corporation is significant and substantial and that the three-Judge panel below failed to recognize the proprietary interest of United States Steel Corporation by not allowing it to be heard on the merits.

Such failure is a violation of the Fifth Amendment which prevents the federal government from taking private property without due process of law.

2. Unemployment Benefits May Be Properly Denied to Claimants Involuntarily Unemployed in a Labor Dispute.

In *In re J. K. Abernathy,* 259 N.C. 190, 130 S.E. 2d 292, the Supreme Court of the United States denied certiorari in a case which is directly in point with the controversy here in the following respects:

> (a) The state labor dispute disqualification was identical to Ohio's statute here in issue in that it disqualified claimants not on strike who lost their employment because of a strike in another state by a union to which they did not belong. Section 96-14(4) of the General Statutes of North Carolina, 1963, and Section 4141.29(D)(1)(a) of the Revised Code of Ohio in effect prior to December 2, 1975.
>
> (b) The state labor dispute disqualification clearly disqualified individuals otherwise eligible and qualified who were *involuntarily* unemployed due to a labor dispute.
>
> (c) A lower court allowed benefits declaring the statute unconstitutional as "an unlawful discrimination against these claimants in violation of the rights guaranteed to them by the Statutes and Constitution of the United States . . . ." North Carolina Superior Court of Mecklenburg County.

The Supreme Court of North Carolina reversed the decision of the lower court, the Superior Court of Mecklenburg County. It directed much of its opinion to the purpose of unemployment compensation and its early history, both in England and in the United States, to show that the fundamental purpose of the labor dispute disqualification in the state laws is twofold: (1) to

maintain a state's neutrality in labor management relations and (2) to prevent severe drains upon the insurance fund. The court quoted with approval from the Nebraska Law Review, Vol. 37, No. 4, of June, 1958 as follows:

> "Because there had been no previous experience [in England] it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating *the primary purpose for* which *the fund* was created—*the payment of benefits when unemployment was due to 'fluctuations in trade.'*" [Underscoring supplied]

See *Hughes, Principles Underlying Labor Dispute Disqualification,* 1946.

After enactment of the Social Security Act of 1935 the Federal Social Security Administration suggested a type of labor dispute disqualification which allowed benefits to be paid to individuals who were not participating in and not directly interested in the dispute—to those who were involuntarily unemployed. See 1940 Edition of the *Manual of State Employment Security* Legislation, pp. 504, 505. This was, however, advice only. The Social Security Board was required to approve all state laws which conformed to the Social Security Act of 1935. Neither the Ohio nor the similar North Carolina labor dispute disqualification provision formed the basis for disapproval by the Federal Social Security Administration. In fact, prior to 1961, the North Carolina labor dispute disqualification was similar to that recommended by the federal people and was replaced by provisions less generous to claimants. See *In re Abernathy, supra.*

The advice of the Social Security Administration was not followed by all the states. Many states followed the lead of Wisconsin which had enacted the Wisconsin Employment Reserves Act of 1932 before enactment of the federal law. That Wisconsin Act disqualified in the following way:

> "An employee who left (. . . or lost) his employment with an employer because of a strike or other bona fide labor dispute is not eligible for benefits . . . for any week in which the strike or labor dispute is in active progress . . . ."

Employees who lost work regardless of fault, and regardless of their lack of interest in the labor dispute were disqualified in Wisconsin and in those states which patterned their strike disqualification after that of Wisconsin.

Some states borrowed labor dispute disqualification language from Wisconsin and at the same time borrowed some of the language of the Social Security Administration. It is impossible to classify all the state labor dispute disqualifications and say that any two are identical. They approach each other as do those of North Carolina and the Ohio law in question here.

When Congress enacted the Social Security Act of 1935 it set forth certain exemptions and classifications such as for employers of less than eight, agricultural labor and domestic service in a private home. Other conditions were designed to give assurance that the state unemployment compensation laws be one in substance as well as name. The nearest to a requirement that a state concern itself with labor disputes was the provision that a state not deny compensation for an individual's refusal to accept new work: "(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute." Section 903, Social Security Act, 42 U.S.C.A. Chap. 7 (Supp.)

These conditions of the Social Security Act were attacked as being an unlawful invasion of the reserved powers of the states in *Charles C. Steward Mach. Co. v. Davis,* 301 U.S. 548, 81 L.Ed. 1279. The Court said at pp. 584-595:

> "The classifications and exemptions directed by the statute now in controversy have support in consideration of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them."

In *Grinnell Corp. v. Hackett,* 475 F.2d 449, the Circuit Court of the First Circuit has explored the Congressional intent in labor dispute situations and found (at 457) that "unambiguous Congressional intent is lacking".

Therefore, we have no federal preemption on the question of whether benefits must be paid or denied to otherwise eligible and qualified claimants who lose or leave their work because of a labor dispute. The states have been left free to enact such labor dispute disqualification provisions as they have considered would maintain the neutrality of the state and prevent substantial drains on their respective funds.

Under the Ohio law as amended, effective December 2, 1975, allowing for the payment of benefits to cer-

tain claimants not participating in and not interested in the labor dispute, it is clear that in a factory where members of several unions are employed and one union of four boilerhouse workers, for example, shuts down the entire plant, those members of the other unions who lose their work are disqualified. Although the opinion speaks approvingly of a new law, the principles of the *Hodory* decision would invalidate the present Ohio labor dispute disqualification because it denies benefits to some who are involuntarily unemployed. It would appear from Footnote 5 that the three-Judge panel was unaware that individuals involuntarily unemployed would be denied benefits under Ohio's labor dispute provision as amended effective December 2, 1975.

The argument which the three-Judge panel uses to grant benefits is that in a strike situation if the employee loses work without fault he should receive benefits. This argument disregards the fact that the employer also is without fault. Why should the employer be forced to pay?

The thrust of the reasoning in the opinion of the three-Judge panel is that the claimants in a labor dispute situation are entitled to benefits if they can show that they are unemployed without "some fault of their own" as is specified in the voluntary leaving, refusal to work and other disqualifications. See pp. 8 and 9 of the Opinion. If such

> "contention finally prevails, there will be, in effect, no labor dispute disqualification at all since all determinations in such situations can be made under other clauses without reference to the labor dispute provision." *Hughes, Principles Underlying Labor Dispute Disqualification,* p. 5.

If the fault of the claimant becomes a proper subject for inquiry by the state in a labor dispute situation, then the state will be abandoning its neutrality in labor disputes.

Obviously, the strike disqualification provisions were adopted for a purpose, namely, to protect the funds to some degree from inordinate drains in labor dispute situations and to maintain the neutrality of the states in such situations.

The three-Judge panel below emphasized the word "involuntary" in the language of Section 4141.29 of the Ohio Revised Code. See p. 8 of the Opinion. We need only to point out that the word "involuntary" must be read in context with the rest of the sentence in which it is found. The sentence cited in Section 4141.29 of the Ohio Revised Code reads as follows:

> "Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in amounts *and subject to the conditions stipulated in Sections 4141.01 to 4141.46 of the Revised Code.*" [Underscoring supplied]

It should be clear, therefore, that being unemployed involuntarily is not the only test for the payment of benefits to those otherwise eligible and qualified. There are instances where other considerations become controlling as when a state decides what it must do in order to protect its fund or to maintain its neutrality in the case of the first labor dispute situation.

Ohio has done a commendable job in maintaining a solvent position for its fund. Many states with generous labor dispute disqualification provisions which pay claimants involuntarily unemployed have been

forced to borrow from the federal government. The total of such borrowings as of April 15, 1976 was $3,077.2 billion. Four additional states are expected to borrow in the first quarter of 1977. The estimated total of outstanding loans as of December 31, 1977 is projected at $6.4 billion according to the United States Department of Labor, Employment and Training Administration, Unemployment Insurance Service, Branch of State Tax Accounting.

We cite again the decision of the Supreme Court of North Carolina in the case of *In re J. K. Abernathy, supra*. The opinion of that Court concludes as follows:

> "The cases here discussed, and many more therein cited would seem sufficient to convince all but the highly skeptical that in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. 'When the subject lies within the police power of the state, debateable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome.' " *Sproles v. Binford,* 286 U.S. 374, 52 S. Ct. 581, 761 Ed. 1167.
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> * * *
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> "Legislative bodies may distinguish, select, and classify objects of legislation .... They may prescribe different regulations for different classes. . . . The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. . . . The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualification contained in the 1961 amendment involves a question of degree and not of principle."

CONCLUSION

United States Steel Corporation submits that its interest in these proceedings is significant and substantial, that it has a proprietary interest in the final decision and that failure to have made it a party violates the due process clause of the Fifth Amendment.

The decision of the three-Judge panel below, in its interpretation of the purpose of the unemployment compensation laws and the authority of the Ohio legislature to enact a strike disqualification law less generous than some other states, erred and it must be reversed.

For the foregoing reasons we urge the Court to take jurisdiction in this case.

Respectfully submitted,

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